91-1270

Supreme Court, U.S.
FILED
FEB 5 1992
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ANN RICHARDS, GOVERNOR OF TEXAS, *et al.*,
Appellants,

vs.

LOUIS TERRAZAS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT FOR APPELLANTS

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

RENEA HICKS*
Special Assistant Attorney General
**Counsel of Record*

JAVIER P. GUAJARDO
Special Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2085
Attorneys for Appellants

OF COUNSEL:
SAMUEL ISSACHAROFF
727 E. 26th Street
Austin, Texas 78705
(512) 471-5151

February, 1992

QUESTIONS PRESENTED

1. May a local three-judge federal district court acting under section 5 of the Voting Rights Act substitute a court-crafted redistricting plan for a legislatively approved plan that obtained section 5 preclearance from the United States Department of Justice?

2. Does preclearance from the United States Department of Justice establish prima facie validity of a redistricting plan so as to preclude interim injunctive relief under section 2 of the Voting Rights Act absent extreme and unique circumstances?

LIST OF PARTIES

Plaintiffs

Louis Terrazas
Ernest Angelo, Jr.
Tom Craddick

Plaintiff-Intervenors

Sim D. Stokes III
Robert A. Estrada
David Sibley
Bill Sims
Eddie Lucio, Jr.

Defendants

Ann Richards, Governor of Texas
Dan Morales, Attorney General of Texas
John Hannah, Jr., Secretary of State of Texas
Bob Slagle
Fred Meyer

Intervenors for limited purposes

Sharon Gabert
Jo Ann Reyes
Royla Cox
Bruce Auld
Fred W. Davis
Jeff Walker
R. E. Thornton
Bob Aikin
Doyle Willis, Jr.

TABLE OF CONTENTS

	PAGES
QUESTIONS PRESENTED	1
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
TEXAS'S JURISDICTIONAL STATEMENT	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
THE QUESTIONS ARE SUBSTANTIAL	7
I. A LOCAL 3-JUDGE FEDERAL COURT, FUNCTIONING AS A SECTION 5 COURT, HAS NO JURISDICTION TO SUBSTITUTE A COURT-ORDERED REDISTRICTING PLAN FOR A LEGISLATIVELY-APPROVED PLAN THAT HAS OBTAINED ADMINISTRATIVE PRECLEARANCE UNDER SECTION 5	8
II. ADMINISTRATIVE PRECLEARANCE PURSUANT TO SECTION 5 ESTABLISHES THE PRIMA FACIE VALIDITY OF A REDISTRICTING PLAN, THEREBY PRECLUDING INTERIM INJUNCTIVE RELIEF UNDER SECTION 2 OF THE ACT ABSENT EXTREME AND UNIQUE CIRCUMSTANCES	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Pages:
Allen v. State Board of Elections, 393 U.S. 544 (1969)	9
Beer v. United States, 425 U.S. 130 (1976)	11
Chapman v. Meier, 420 U.S. 1 (1975)	18
Clark v. Roemer, 111 S.Ct. 2096 (1991)	10
Connor v. Finch, 431 U.S. 407 (1977)	18
Davis v. Bandemer, 478 U.S. 109 (1986)	16
Hathorn v. Lovorn, 457 U.S. 255 (1982)	9
City of Lockhart v. United States, 460 U.S. 129 (1983)	8
McDaniel v. Sanchez, 452 U.S. 130 (1981)	10
Morris v. Gressette, 432 U.S. 491 (1977)	10
Perkins v. Matthews, 400 U.S. 379 (1971)	10
Presley v. Etowah County, ___ U.S. ___ (Jan. 27, 1992) (Nos. 90-711 & -712)	11
Richards v. Terrazas, No. A-498	7
South Carolina v. United States, 585 F.Supp. 418 (D.D.C. 1984 (3-judge court)	12
South Carolina v. United States, 589 F.Supp. 757 (D.D.C. 1984)	12
Terrazas v. Ramirez, ___ S.W.2d ___, No. D-1817, 1991 WL 269035 (Tex. Dec. 17, 1991)	5
Thornburg v. Gingles, 478 U.S. 30 (1986)	17
Upham v. Seamon, 456 U.S. 37 (1982)	13
Westwego Citizens for Better Government v. City of Westwego, 872 F.2d 1201 (5th Cir. 1989)	17
Whitcomb v. Chavis, 403 U.S. 124 (1971)	15
White v. Weiser, 412 U.S. 793 (1973)	13

Statutes and Rules:

28 C.F.R. § 51.54(b)(3)	12
28 C.F.R. § 51.55(b)(2)	15
28 U.S.C. § 1253	2
28 U.S.C. § 2284(a)	2
42 U.S.C. § 1973	2
42 U.S.C. § 1973l(b)	9
42 U.S.C. § 1973c	2
Tex. Election Code § 172.023(b)	4

Miscellaneous:

Dallas Morning News, Feb. 1, 1992	18
N.Y. Times, Jan. 26, 1992	18

TEXAS'S JURISDICTIONAL STATEMENT

The Governor, Attorney General, and Secretary of State of Texas (Ann Richards, Dan Morales, and John Hannah, collectively termed "the state"), appellants herein, appeal from a preliminary injunction entered by a divided three-judge panel of the United States District Court for the Western District of Texas. The preliminary injunction compels the state to conduct its 1992 primary elections for the Texas Senate under a court-ordered interim redistricting plan instead of a precleared legislative redistricting plan. The challenged preliminary injunction is embodied primarily in the district court order of January 10, 1992, as amended on January 13, 16, and 24, 1992, and to a lesser extent, in the district court order of December 24, 1991. This jurisdictional statement is submitted to show that the Court has jurisdiction of the appeal, that substantial questions are presented, and that summary reversal is warranted.

OPINIONS BELOW

The opinions below are: Order and Judgment of January 10, 1992; Amended Order and Judgment of January 13, 1992, January 16, 1992, and January 24, 1992; and Summary Opinion and Judgment of December 24, 1991. None is reported. They are reproduced in the appendix accompanying this statement ("J.S. App.") beginning at 1a, 18a, 21a, 23a, and 25a, respectively.[1]

---

[1] This appeal focuses on the order of January 10, 1992, and to a somewhat lesser extent, on the part of the order of December 24, 1991, applicable to the Texas Senate. The order of January 13, 1992, makes technical corrections to some relevant demographic data, and the orders of January 16 and 24, 1992, address election administration matters not pertinent to the issues raised here.

In evaluating the district court's orders, the Court should be aware that the same principal set of plaintiffs also challenged redistricting plans for the Texas House of Representatives and Texas Congressional seats, neither of which is before the Court.

JURISDICTION

The three-judge district court was convened pursuant to 28 U.S.C. § 2284(a), and entered its preliminary injunction under the aegis of section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, because the action challenged the apportionment of the Senate of Texas, a statewide legislative body. The preliminary injunction orders which the state appeals were entered on January 10, 1992, as amended on January 13, 16, and 24, 1992, as well as on December 24, 1991.

The state filed a Notice of Appeal and an Amended Notice of Appeal on January 13, 1992, and a Second Amended Notice of Appeal on February 3, 1992. They are reproduced at J.S. App. 52a, 54a, and 56a, respectively, (omitting the certificates of service).

The jurisdiction of the Court to hear this appeal rests on 28 U.S.C. § 1253 and 42 U.S.C. § 1973c. It has been timely invoked.

STATUTES INVOLVED

The principal federal statutes involved are sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973 and 1973c. They are reproduced at J.S. App. 58a & 59a.

The principal state statute involved is Senate Bill 1 ("S.B. 1" or "legislative Senate plan"), enacted and signed

---

The three challenges -- to the Senate, the House, and Congress -- were assigned separate docket numbers (with the Senate challenge assigned "-426"). The district court's orders sometimes addressed more than one of the challenges, with the consequence that more than one of the docket numbers often appears in the heading of an order.

on January 8, 1992, in the third called session of the 72nd Texas Legislature. It is the legislative redistricting plan for the Texas Senate and is too voluminous to warrant reproduction, even in the joint appendix, inasmuch as its precise details are not involved at this stage of the appeal.[2]

STATEMENT OF THE CASE

The Texas Senate is comprised of thirty-one members elected from thirty-one separate districts. Together, the senators function as one arm of the bicameral Texas Legislature, collectively representing approximately 17 million Texans. All thirty-one seats are to be filled by election in 1992.

The challenge to the state's Senate redistricting plan was filed in late May, 1991, before it had even been enacted. What was then known as Senate Bill 31 ("S.B. 31" or "abandoned Senate plan") did not become law until mid-June; nonetheless, the district court treated the challenge as one to the enacted law, S.B. 31. In August, the state submitted S.B. 31 to the Department of Justice ("DOJ") for administrative preclearance under section 5 of the Voting Rights Act.

In early October, the state settled a state law challenge to S.B. 31 in state court. The state withdrew its section 5 DOJ submission of S.B. 31, promptly substituting a submission of the Senate plan approved in the state court settlement. The new Senate plan became known as the *Quiroz/Mena* plan, after the styles of the state cases in which the settlements were approved. (The later-enacted S.B. 1 plan *is* the *Quiroz/Mena* plan.)

---

2 S.B. 1's district boundaries were admitted into evidence at the preliminary injunction hearing as an appendix to Defendants' Exhibit 22.

DOJ precleared the Senate plan on November 18, 1991. *See* Letter from Mr. Dunne to Texas Secretary of State Hannah, J.S. App. 62a.[3] On December 3, 1991, the state began implementation of its precleared Senate plan through the opening of the candidate qualifying period under state law. *See* TEX. ELECTION CODE § 172.023(b).

In the meantime, before the Senate plan had been precleared, the federal district court on its own had established a deadline of November 12, 1991, for parties to submit briefs on the interim relief they would be seeking if section 5 preclearance had not been obtained in time for the 1992 elections to occur on schedule. Later, after the November 12th deadline, the district court gave the challengers until November 27th to file for an interim Senate redistricting plan, still conditioning such relief, however, on the failure of timely section 5 preclearance. Notwithstanding DOJ's preclearance over a week earlier of the state's Senate plan, and the conditional nature of the district court's invitation, the challengers filed for a court-ordered interim Senate plan.

The preliminary injunction hearing on whether the district court would order interim Senate, House, and Congressional plans began the afternoon of December 10th and ended on December 13th. The Senate plan sponsored by the state at the hearing was the *Quiroz/Mena* (that is, S.B. 1) plan, not S.B. 31 (the now-abandoned plan targeted in the challengers' pleading). The state argued to the district court that, since a state-sponsored plan was available and had been precleared by DOJ, that state plan should be implemented if any injunctive relief were to issue.

---

[3] DOJ's reserved deadline of January 14, 1992, for possible reexamination of its November 18th preclearance decision passed without DOJ action.

Shortly after the preliminary injunction hearing, the Supreme Court of Texas returned the *Quiroz/Mena* settlement to the state district court. It did not invalidate the settlement on any substantive ground, but did impose (in a decision with no majority opinion) new procedural requirements for state district courts' approval of redistricting settlements. *See Terrazas v. Ramirez*, __ S.W.2d __, No. D-1817, 1991 WL 269035 (Tex. Dec. 17, 1991).[4] This decision rested purely on independent state procedural grounds and did not affect the federal issues before the three-judge federal district court.

Immediately after the Texas Supreme Court's action, the Governor called the Texas Legislature to convene in special session on January 2, 1992. Legislative redistricting was the only issue permitted on the agenda.

Notwithstanding the Governor's call, on December 24, 1991, eleven days after conclusion of the preliminary injunction hearing, the district court, by a 2-1 vote, ordered the state to implement a court-ordered, interim Senate plan for the 1992 primary elections scheduled for March 10, 1992. The district court rejected the state's arguments in favor of the *Quiroz/Mena* plan as an interim apportionment measure and, instead, crafted its own redistricting plan. In so acting, the district court relied exclusively upon the Voting Rights Act, explicitly eschewing any other basis for its decision.

The district court acknowledged the Senate plan sponsored by the state to be the only one before it that

---

[4] The state district court complied with the *Terrazas v. Ramirez* procedural directive and entered final judgment on January 13, 1992, requiring the state to implement S.B. 1 as its Senate redistricting plan.

had received section 5 preclearance but nonetheless ignored it. Instead, the court characterized the state's plan as "merely an alternative proposal submitted to the Court that because of the actions of the Secretary of State happened to receive favorable review by the DOJ[.]" J.S. App. 39a.

Judge Garwood, the panel member from the Fifth Circuit, dissented from the two-member majority's failure to show deference to state legislative choices. It was his view that the court should give the legislature an opportunity to act in the special session that was to commence in only a week. *See* J.S. App. 51a.

The state moved the district court to modify or stay its December 24th judgment to give the legislature a chance to act. The district court did not rule immediately on the motion.

While the state's motion pended before the district court, the legislative session commenced, and on January 8, 1992, the Texas Legislature enacted the precleared *Quiroz/Mena* Senate plan as S.B. 1. In a companion enactment of the same date, known as House Bill 2 ("H.B. 2"), the legislature established March 10, 1992, as the preferred party primary date, but more importantly, established its legislative preference to have the party primaries moved to April 11, 1992, if that was the only way that the federal court would permit the Senate primaries to be conducted using the precleared S.B. 1. In other words, H.B. 2 gave legislative primacy to implementation of S.B. 1 instead of to the March 10th primary election.

The next day, the state filed an emergency motion for the district court to substitute the S.B. 1 plan for the court-ordered interim Senate plan. The next day after that, on January 10th, the district court, again by a 2-1

vote, denied the motion without a hearing. Instead of ordering the March 10th primary elections to go forward under the precleared, legislatively-enacted Senate plan, the court ordered the primaries to go forward under a court-ordered Senate plan.[5] Not only did the court-ordered plan reject the state districting arrangements, but it also contained an unexplained maximum population deviation of 9.98%. Judge Garwood again dissented because the court had failed to show deference to the state's legislative choice for a Senate plan. J.S. App. 16a

The state immediately sought an emergency stay from this Court of the district court's order concerning the Senate. The Court denied the stay on January 16, 1992, in *Richards v. Terrazas*, No. A-498.

THE QUESTIONS ARE SUBSTANTIAL

The district court acted beyond its jurisdiction under section 5 of the Voting Rights Act, and abused its very limited discretion under section 2 of the Act, by substituting a court-ordered interim plan for a legislatively-approved plan that had been precleared under section 5. In this circumstance, expedited summary reversal is necessary to avoid an unprecedented encroachment on state sovereignty and to permit the state to conduct its upcoming 1992 primaries (rescheduled if necessary) under a precleared plan reflecting its own legislative choices rather than the unprecleared (and evidentiarily unexamined) choices of a two-member majority of the district court.

---

[5] The January 10th order by its terms reaches only the 1992 primary elections. The court has said nothing about the 1992 general elections -- or about why it has said nothing about them.

I.

A LOCAL THREE-JUDGE FEDERAL COURT, FUNCTIONING AS A SECTION 5 COURT, HAS NO JURISDICTION TO SUBSTITUTE A COURT-ORDERED REDISTRICTING PLAN FOR A LEGISLATIVELY-APPROVED PLAN THAT HAS OBTAINED ADMINISTRATIVE PRECLEARANCE UNDER SECTION 5

In shunting aside the legislatively-adopted, precleared plan embodied in S.B. 1, and substituting its own court-devised interim plan, the district court functioned as a local federal court convened under section 5 of the Voting Rights Act. Its scheduling orders conceived the preliminary injunction hearing as one tied to a section 5 failure, and when the time came, it addressed the Senate redistricting issue as though it were faced with a vacuum which it was obligated to fill. The vacuum did not in fact exist, but the court's approach, and the language it employs, demonstrate its reliance on the principles of section 5. It had no jurisdiction to supplant state choices as it did.

Issued barely more than a day after S.B. 1's enactment and without benefit of any evidentiary hearing, the district court's meandering January 10th opinion assails the state's policy choices on a number of grounds. The grounds, such as the extensive comments on the cost to Texas taxpayers of delaying elections (as the legislature contingently chose to do) and the possible impact of voter registration certificates on voter turnout, *see* J.S. App. 8a, 11a, largely present no federal question. Insofar as the decision rests on state law grounds, it is legally ineffective and must be reversed. *City of Lockhart v. United States*, 460 U.S. 129, 132-33 & n.8 (1983).

The federal law ground identified by the district court for its preliminary injunction of January 10, 1992,

is section 5 of the Voting Rights Act. Indeed, the decision, as were the scheduling orders culminating in it, is conceptualized exclusively in section 5 terms. The district court states in its January 10th order:

> As for the federal questions presented at this time, this Court further finds any attempt to adopt the legislatively-draw [sic] Senate plan would delay the elections since preclearance of that plan has not been obtained and there has been no indication that it will be obtained in time for the election to proceed.

J.S. App. 12a.

The district court misperceives its authority in this case. The jurisdiction of a local three-judge court under section 5 is limited to the determination of whether a proposed change in election practices is subject to the preclearance requirements of the Act and, if it is, whether it has been precleared. *City of Lockhart, supra*, 460 U.S. at 129 n.3; *Allen v. State Board of Elections*, 393 U.S. 544, 557-60 (1969).

The local court is expressly denied authority to render declaratory or other judgments concerning the legality of a proposed change in election practices under section 5. That power, at least in the judicial realm, is reserved exclusively to the District Court for the District of Columbia. 42 U.S. C. § 1973*l*(b); *Hathorn v. Lovorn*, 457 U.S. 255, 267 (1982).

Any injunctive power the local three-judge court may have exercised in this case had to have been predicated on a finding that the state was seeking to implement an electoral change as to which it had not received preclearance. Only in such circumstances may the local district court exercise its equitable powers to fashion an

interim plan pending preclearance of a state-created redistricting plan. *Perkins v. Matthews*, 400 U.S. 379, 396-97 (1971); *see also Clark v. Roemer*, 111 S.Ct. 2096, 2105 (1991). Two distinct reasons reveal why the district court ventured too far in substituting its own interim plan for the state's S.B. 1.

First, the local three-judge district court lacked jurisdiction to enter a section 5 order on January 10, 1992. The court made no finding that the state was not in compliance with section 5, nor could it have. As of January 8, 1992 -- only two days earlier -- the state had properly approved under its laws a Senate redistricting plan that already had been precleared. The state already had sought and obtained section 5 preclearance of the *Quiroz/Mena* plan, which is S.B. 1 in court garb. A state plan crafted by a state court under state law is undoubtedly a state enactment subject to section 5. *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981). Administrative preclearance by DOJ is a final, judicially non-reviewable act under section 5. *Morris v. Gressette*, 432 U.S. 491 (1977). Thus, as of November 18, 1991, there was no federal issue under section 5 of the Act concerning the legality and enforceability of the *Quiroz/Mena* plan. The state had faithfully and fully complied with federal voting rights requirements.

The only intervening event was a decision of the state Supreme Court premised exclusively on state procedural grounds. That court's decision in *Terrazas v. Ramirez*, while containing no rule of decision supported by a court majority, at best set aside the *Quiroz/Mena* settlement on the grounds stated in a three-member plurality opinion. It required a fuller opportunity for affected parties' intervention, for a trial court hearing on the proposed settlement, and (striking a familiar chord) for the trial court to give the legislature an opportunity to act correctively (which it indeed did). The grounds and

reasoning of the Texas Supreme Court were premised exclusively on state law questions that did not affect the legality of the underlying redistricting plan under section 5.

In the wake of the state Supreme Court decision, the state promptly adjusted the procedural basis for the plan embodied in the *Quiroz/Mena* settlement. It simply legislatively enacted the identical plan as S.B. 1. This adjustment created no federal law issue under section 5. Substituting one form of state law implementation (legislative approval and gubernatorial signature) for another (state court judgment) which had been invalidated on state procedural grounds does not implicate section 5 concerns. As this Court has written, "Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect." *City of Lockhart, supra*, 460 U.S. at 133.

This substitution of one form of enactment of a state plan for another is beyond section 5's purview. It does not affect the procedures for casting ballots, the requirements for candidates for office, the districting system itself, or the types of offices to which candidates may be elected. As this Court held only last week, these are the types of electoral changes to which section 5 applies. *Presley v. Etowah County*, __ U.S. __ (Jan. 27, 1992) (Nos. 90-711 & -712). The substitution of one form of state ratification for another *of the identical plan* is not a "change" requiring preclearance under section 5.

Moreover, retrogression, as established in *Beer v. United States*, 425 U.S. 130 (1976), cannot be present here. After receiving administrative preclearance, but before the state Supreme Court's state law procedural invalidation, the state had begun implementing the plan embodied in the *Quiroz/Mena* settlement and S.B. 1.

Candidate qualifying pursuant to the plan had begun for the March 10th general primary election.[6] The *Quiroz/Mena* plan thus became the benchmark against which any subsequent changes, legislative or state court-ordered, would have to be measured under section 5 standards.[7] Because the S.B. 1 plan precisely mirrors the *Quiroz/Mena* plan, it is neither a change nor is it possibly retrogressive.

The foregoing matters firmly establish that on January 8, 1992, the state had a legislatively enacted plan, duly executed by the Governor, which already had been precleared by DOJ. This circumstance left the district court with no jurisdiction to enter its injunctive order of January 10, 1992. Indeed, to hold otherwise would repudiate the principle of non-reviewability of administrative preclearances announced in *Morris v. Gressette, supra.* The section 5 remedy is an "unusual" and "severe" procedure. *Allen*, 393 U.S. at 556. The rationale of *Morris* rests on the proposition that the extraordinary remedy of thwarting implementation of state legislation, redistricting plans included, "was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission." 432 U.S. at 504. Accordingly, the district court's severe intrusion into the state's domain is

---

[6] The opening of a candidate qualifying period has been treated by both DOJ and reviewing courts as the implementation of an election system for purposes of section 5. *See South Carolina v. United States*, 585 F.Supp. 418, 421-22 (D.D.C. 1984 (3-judge court); *South Carolina v. United States*, 589 F.Supp. 757, 758 (D.D.C. 1984). *See also* letter of John R. Dunne to Texas Secretary of State Hannah, Nov. 12, 1991, J.S. App. 69a (warning Texas that it would violate section 5 if it opened candidate qualifying for its House of Representatives under an unprecleared plan because that would constitute implementation).

[7] The unprecleared court-ordered interim plan on appeal here does not serve as a benchmark. 28 C.F.R. § 51.54(b)(3).

fundamental legal error which warrants summary reversal.

Even were the Court to reject the state's claim that its Senate redistricting plan fully complies with section 5, there remains a second reason why the district court's imposition of its own plan is a venture beyond federalism's limits. Local three-judge courts have no authority to simply substitute their own reapportionment preferences for those of a state legislature. *Upham v Seamon*, 456 U.S. 37, 40-41 (1982); *White v. Weiser*, 412 U.S. 793, 795 (1973). As this Court revealingly characterized it, "primary jurisdiction" over legislative reapportionment rests with state legislatures. *Id.*

The district court inverted this maxim based on nothing more than the apparent view that, preclearance or not, it simply preferred its redistricting scheme over the legislatively chosen (and administratively precleared) one. This policy-based step tramples all limits which this Court has placed to insure the primary jurisdiction of the state legislature in matters of legislative apportionment. It ignores the plain direction of the Court in *Upham v. Seamon* that, in the absence of any objection by the Attorney General (and here we have none), "a court must defer to the legislative judgments the [redistricting] plans reflect, even under circumstances in which a court is required to effect an interim . . . plan." 456 U.S. at 40-41.

If the primary jurisdiction principle embodied in cases such as *Upham v. Seamon* has any content, then it invalidates the district court's usurpation of state legislative authority under any circumstances. The clear import of *Upham* is that determinations of policy are vested exclusively with the states and not federal courts. This lesson is all the more dramatically implicated here, where the state's enacted plan has obtained section 5 preclearance. In calling the legislature into special

session and in enacting a plan precisely mirroring a plan precleared less than two months earlier, both the Governor of Texas and the Texas Legislature undoubtedly relied on there being precisely the kind of predictability which this Court posited only last week in the penultimate paragraph of *Etowah County* as federalism's compulsion in the arena of state elections and governance.

The state put in place as its own a redistricting plan which had just received DOJ's crucial imprimatur. Barely over a day later, on January 10th, and without so much as a hearing, the district court changed the rules. It rejected the idea of predictability, substituting for it a near-whimsical interpretation of voting rights and federalism strictures. Section 5 and the doctrine of *Upham v. Seamon* are more confining than that; they require reversal of the district court's preliminary injunction.

II.

ADMINISTRATIVE PRECLEARANCE PURSUANT TO SECTION 5 ESTABLISHES THE PRIMA FACIE VALIDITY OF A REDISTRICTING PLAN, THEREBY PRECLUDING INTERIM INJUNCTIVE RELIEF UNDER SECTION 2 OF THE ACT ABSENT EXTREME AND UNIQUE CIRCUMSTANCES

The process leading to the January 10th order and its structure and language all point to it as a decision premised on section 5's doctrines. What the district court did is determinative; the labels affixed are irrelevant. Notwithstanding its section 5 foundation, the district court's opinion makes reference to section 2 of the Act. Even under section 2, the district court's unprecedented injunctive relief still veered from the course of legislative deference clearly marked by this Court's prior decisions.

Redistricting is a legislative task "which the federal courts should make every effort not to pre-empt." *McDaniel v. Sanchez*, 452 U.S. at 150 n.30. For jurisdictions such as Texas which are covered under section 5, there already exists a major intrusion into the traditional state domain of choosing how and when its elected officials are to be chosen. Before it can take even the first step of implementation of a covered change, the state must obtain approval from a federal judicial or administrative forum in the District of Columbia. Successfully clearing that preclearance hurdle may not entitle the state afterwards to proceed unimpeded, but the Court's repeated emphasis on the limited equitable powers of federal courts in reapportionment cases, *see, e.g., Upham v. Seamon, supra, and Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971), surely dictates that clearing the section 5 hurdle must, at least in the short run, greatly strengthen the presumption of validity which district courts are duty bound to give to state legislative enactments in the redistricting arena. As the Court has repeatedly noted, the preclearance mechanism reflects congressional choice in favor of specialized revision by DOJ and the District Court for the District of Columbia. *McDaniel*, 452 U.S. at 150-51. At the very least then, approval of the proposed redistricting plan under section 5 must create a strong prima facie inference of legitimacy for the state redistricting plan.

Here, the state's Senate redistricting plan cleared the section 5 hurdle only to be rejected by the district court. As previously set forth, the district court lacked any authority for this action. Similarly, the district court's weak global reference to section 2 cannot serve as a possible justification for its extraordinary injunctive order. In issuing its court-ordered plan as a preliminary injunction, the district court impermissibly disregarded the clear import and direction of the precedents from

this Court which establish the principle that section 5 preclearance vests a plan with prima facie validity, which can be overcome through a preliminary injunction only in extreme and unique circumstances not present in this case.[8]

In fact, the circumstances of this case are precisely the kind which warrant the most stringent application of the concept of prima facie validity to a precleared redistricting plan. Standing is questionable at best at this stage. This case is not a class action, and it has no organizational plaintiffs. The district court made no finding concerning the right of the named plaintiffs to bring a claim for relief under the Voting Rights Act.

It does not follow from the fact that the challengers may have had standing to pursue their partisan gerrymandering claim under *Davis v. Bandemer*, 478 U. S. 109 (1986), that they therefore had standing to seek relief under the Voting Rights Act as well. Of the alleged individual plaintiffs and plaintiff-intervenors, only three testified at the preliminary injunction hearing. All of them are Anglos, one a state representative and two, state senators. Additionally, this failure of testimony by any minority plaintiff challengers means that the challengers failed to satisfy the indispensable prerequisites to preliminary injunctive relief, including irreparable harm and the likelihood of success on the merits.

Most critically, the challengers cannot have satisfied the "likelihood of success on the merits" element for preliminary injunctions. There are no factual findings

---

[8] This principle is further buttressed by the fact that DOJ, in exercising its section 5 administrative preclearance functions, looks to whether a change would present a "clear violation of amended section 2." 28 C.F.R. § 51.55(b)(2). The state's Senate plan cleared that hurdle, too.

about how or whether S.B. 1 violates section 2 in any fashion. There is a single sentence making a global statement about S.B. 1's section 2 insufficiency, with absolutely no supporting or subsidiary findings. J.S. App. 12a-13a. That, however, falls woefully short of the required specificity. Section 2 liability determinations must be district-specific. *Thornburg v. Gingles*, 478 U.S. 30, 59 n.28 (1986); *cf. Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201, 1203-04 (5th Cir. 1989) (requiring detailed findings in section 2 cases). As this Court stressed in *Upham*, a section 5 case, even the finding of impermissibility in one district, does not give a local district court license to treat all legislative redistricting as a *tabula rasa*. 456 U.S. at 43. *See also White v. Weiser*, 412 U.S. at 794-95 (under one-person, one-vote challenge, courts should honor state policies as much as possible).

The question of how the public interest element of preliminary injunctions weighs in the balance of this case is perverted by the district court's conclusion that, notwithstanding the express public policy of H.B 2 giving primacy to implementation of S.B. 1 over the timing of the primaries, it is better situated to decide what is best for Texas taxpayers and voters. The public interest is embodied in the state's legislative choices which are simply disregarded by the district court. Additionally, the district court burdens the public interest of Texans by setting in motion a court-ordered plan which means that every Texas Senator will have to run again in 1993. Implementation of S.B. 1 instead of the court-ordered plan would heighten the possibility that this time around is the last time this decade that all thirty-one Texas senatorial positions will be open. *See* Article III, § 3, of the Texas Constitution (requiring that any reapportionment opens all positions for election).

Finally, the evidentiarily untested court-ordered plan contains an unexplained 9.98% maximum population deviation. This deviation flies in the face of this Court's directives that court-ordered redistricting plans must contain only *de minimis* population variations among districts. *See Connor v. Finch*, 431 U.S. 407, 414 (1977); *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975). Thus, the district court has supplanted a legislatively enacted, precleared plan with its own plan which on its face fails to satisfy constitutional one-person, one-vote standards.

The prima facie validity of S.B. 1 is untouched by the record or the district court's findings in this case. What the record and the district court's own words in its January 10th order reveal is not the affording of presumptive validity and deference by a federal court, but instead the overly exuberant application of the district court's policy preferences in the area of redistricting.[9] Reversal is required in such circumstances.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's preliminary injunction of January 10, 1992 (and subsidiarily of December 24, 1991) insofar as it enjoins use of S.B. 1 and requires use of the court-ordered Senate redistricting plan. Upon reversal, the Court should remand the matter to the district court with instructions that it reschedule all or part of the party primaries set for March 10, 1992, to a later time, and that it permit the use of S.B. 1 in such rescheduled primaries, as well as the general elections in November, 1992.

---

[9] Clouds of confusion still hover over aspects of the district court's orders. *See* N.Y. Times, Jan. 26, 1992, § A, at 12 ("Texas Remapping Battle Heats Up, Threatening to Singe the Democrats"); Dallas Morning News, Feb. 1, 1992, § A, at 1 ("Morales investigates call between lawmaker, judge").

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

RENEA HICKS*
Special Assistant Attorney General
**Counsel of Record*

JAVIER P. GUAJARDO
Special Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2085
Attorneys for Appellants

Of Counsel:
SAMUEL ISSACHAROFF
727 E. 26th Street
Austin, Texas 78705
(512) 471-5151

February, 1992